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IN THE

Supreme Court of the United States

October Term, 1962

No. 68

NATHANIEL WRIGHT, *et al.*,

Petitioners,

—v.—

GEORGIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Court of Georgia is reported at 217 Ga. 453, 122 S. E. 2d 737 (1961) (R. 52).

Jurisdiction

The judgment of the Supreme Court of Georgia was entered on November 9, 1961 (R. 58). Rehearing was denied November 21, 1961 (R. 60). The petition for certiorari was filed February 17, 1962, and was granted on June 25, 1962. Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3), petitioners having asserted below and claiming here, denial of rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves Georgia Code Annotated, Section 26-5301:

> Unlawful Assemblies—Any two or more persons who shall assemble for the purpose of disturbing the public peace or committing any unlawful act, and shall not disperse on being commanded to do so by a judge, justice, sheriff, constable, coroner, or other peace officer, shall be guilty of a misdemeanor.

Questions Presented

I.

Whether the conviction of petitioners for unlawful assembly denied them due process of law under the Fourteenth Amendment, where they were convicted on no evidence of guilt, or merely because they were Negroes who peacefully played basketball in a municipal park customarily used only by white persons, under a statute which was drawn in sweeping and general terms and which gave no warning that such conduct was prohibited.

II.

Whether the decision below asserts any adequate nonfederal ground for limiting consideration of an aspect of an important constitutional right where the court below unjustifiably determined that such right had been abandoned.

Statement

Petitioners, six young Negro men ranging from 23 to 32 years of age (R. 39) in Savannah, Georgia, have been charged and convicted of the crime of unlawful assembly, a misdemeanor, in violation of §26-5301, Georgia Code Annotated. It was charged, in an accusation signed by the Solicitor General of the Eastern Judicial Circuit of Georgia, that petitioners on January 23, 1961:

> . . . did assemble at Daffin Park for the purpose of disturbing the public peace and refused to disburse (sic) on being commanded to do so by Sheriff, Constable and Peace Officer, to wit: W. H. Thompson and G. W. Hillis . . . (R. 8).

Petitioners were brought before the city court of Savannah, Georgia on May 18, 1961; they filed demurrers raising constitutional defenses which were overruled (R. 11-13); entered pleas of not guilty (R. 10); and were tried and found guilty by a jury (R. 10). The court sentenced five petitioners to fines of one hundred dollars or five months in jail (R. 10-11); the sixth petitioner, Nathaniel Wright, was sentenced to a fine of one hundred twenty-five dollars or six months in jail (R. 11).

The evidence for the State consisted of testimony by the two arresting officers, G. H. Thompson and G. W. Hillis, by another officer, Sgt. Dickerson, who arrived at the scene of the alleged crime after the arrest, and by Carl Hager, Superintendent of the Savannah Recreational Department, who was not present during the incident but testified concerning certain city park department policies. The defendants presented no evidence.

At about 2:00 p.m. on January 23, 1961, police officers Thompson and Hillis were on duty in an automobile in Daffin Park, a fifty acre recreational park in Savannah, Georgia (R. 39; 49). Officer Thompson stated:

> This matter first came to my attention when this white lady had this conversation with us, the lady who told us that colored people were playing in the Basket Ball Court down there at Daffin Park, and that is the reason I went there, because some colored people were playing in the park. I did not ask this white lady how old these people were. As soon as I found out these were colored people I immediately went there (R. 40-41).

When the officers arrived at the basketball court, according to Officer Hillis,

> . . . the defendants were playing basketball. They were not necessarily creating any disorder, they were just 'shooting at the goal', that's all they were doing, they wasn't disturbing anything (R. 50; see also R. 41).

Petitioners were well dressed in street clothes; "some of them had on dress shirts, some of them had on coats—not a dress coat, but a jacket" (R. 39). The two officers approached the defendants, and both asked the defendants to leave the basketball court. Officer Thompson testified:

> When I came up to these defendants I asked them to leave; I spoke to all of them as a group when I drove up there, and I asked them to leave twice, but they did not leave at that time. I gave them an opportunity to leave. One of the, I don't know which one it was, came up and asked me who gave me orders to come out there and by what authority I came out there, and I told him that I didn't need any orders to come out there . . . (R. 40).

Officer Hillis said:

> Officer Thompson told them that they would have to leave, he told them that at first, and they did have an opportunity to leave after he told them that. He asked them to leave, and then I asked them to leave after I saw they wasn't going to stop playing, and [fol. 61] when I asked them to leave one of them made a sarcastic remark, saying: "What did he say, I didn't hear him", he was trying to be sarcastic. When I told them to leave there was one of them who was writing with a pencil and looking at our badge numbers. They all had an opportunity to leave before I arrested them, plenty of time to have left, but I told them to leave, they wouldn't leave and I put them under arrest (R. 49-50).

Officer Thompson testified further on direct that "The purpose of asking them to leave was to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people" (R. 40).

On cross examination Officer Thompson said:

> *I arrested these people for playing basketball in Daffin Park. One reason was because they were negroes.* I observed the conduct of these people, when they were on the basketball court and they were doing nothing besides playing basketball, they were just normally playing basketball, and none of the children from the schools were there at that particular time[1] (R. 41). (Emphasis added.)

[1] The officer had testified that children from nearby schools play in the park "every afternoon when they get out of school . . . about 2:30 in the afternoon, and this was around 2:00 o'clock" (R. 40).

On cross examination Policeman Thompson stated that there was a driveway about 15 yards from the basketball court, and that five or six cars were riding around the driveway, but that "I wouldn't say that that was unusual traffic for that time of day" (R. 41).

Daffin Park, where these incidents took place, is a part of the system of playgrounds maintained by the Recreational Department of the City of Savannah under the direction of Superintendent Carl Hager, who testified that the city parks were located in various colored and white neighborhoods with fourteen parks in white areas and seven parks in Negro areas (R. 42-44), and that "It has been the custom to use the parks separately for the different races" (R. 45). With regard to the Daffin Park area, Mr. Hager said, "around that area is mostly white" (R. 43).[2]

Neither of the arresting officers testified that petitioners violated any park rules. Officer Thompson said that he had never arrested people in Daffin Park for playing basketball there, and that, "I don't have any knowledge myself if any certain age group is limited to any particular basketball court, I don't know the rules of the City Recreational Department" (R. 41).

Superintendent Hager, whose office is located in Daffin Park, was informed of the arrests after they had been made and the police and defendants had left (R. 43). He was

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[2] Mr. Hager did state that occasionally colored children had played in the Daffin Park area and that no action had been taken (R. 43). Officer Thompson said:

> I have observed colored children playing in Daffin Park, but not playing basketball, but I have observed them playing and fishing, we had gotten previous calls that they were fishing in there and such, but not playing basketball (R. 42).

He said that he had not arrested those children but that he arrested these people, the petitioners, "because we were afraid of what was going to happen" (R. 42).

not a witness to the incident. He did testify about certain park rules and policies, stating that, " . . . we have no objection to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people" (R. 44), and that, "Grownups could use [the basketball courts] if there was no other need for them" (R. 45). Officer Thompson had testified that at the time of the arrest "none of the children from the schools were there at that particular time" and that "it would have been at least 30 minutes before any children would have been in this particular area" (R. 41). Although the arresting officers made several comments about the fact that petitioners were wearing street clothes, asserting that they were dressed up and had on "nice clothes" (R. 39; 42; 48), Mr. Hager said that the Recreational Department "would probably not expect" the usual basketball attire—short trunks, etc.—if persons "were playing in an unregulated and unsupervised program, and it would be consistent with our program to allow persons to wear ordinary clothing on the courts if they chose to do so, I don't think that we would object to that" (R. 45). And, indeed, Officer Thompson acknowledged that:

> The people who play basketball don't usually have uniforms on, sometimes they do and sometimes they don't.[3] It is possible to play basketball in street clothes (R. 42).

At the close of the evidence defense counsel made an oral motion for acquittal, arguing that there was no evidence that defendants went to the park for the purpose of disturbing the peace in violation of §26-5301; the court over-

[3] A portion of this sentence was omitted by the printer in preparing the record for this Court. See original record on file in this Court, pages 53-54.

ruled the motion (R. 14-16). The charge to the jury was general; it did not include any discussion of the elements of the defense except for a reading of the statute to the jury and a statement that city police officers were "peace officers" within the meaning of §26-5301 (R. 61-64). After the verdict and sentences (R. 10-11) petitioners filed identical motions for new trial, which were overruled by the court on July 24, 1961 (R. 17-38). The cases were consolidated for appeal (R. 51).

The Supreme Court of Georgia reviewed the convictions and affirmed, rejecting petitioners' arguments (R. 58). The opinion of the Court dealt with petitioners' constitutional claims in the following manner:

1) The Court refused to consider any of the grounds urged in the motion for new trial, asserting that the exception to the order overruling the motion for new trial was abandoned by petitioners' brief in the Supreme Court of Georgia (R. 54). The Court asserted that the brief contained "no argument, citation of authority, or statement that such grounds were still relied upon," but "merely referred to the third ground by asking: 'Did the Court commit error in overruling plaintiff's in error motion for new trial?'" (R. 54).

The motions for new trial (R. 17-38) had objected that the verdict was "contrary to the evidence and without evidence to support it" (¶1), "decidedly and strongly against the weight of the evidence" (¶2), and was "contrary to law and the principles of justice and equity" (¶3). The motion had claimed a denial to the defendants of due process of law under the "First and Fourteenth Amendments" to the Constitution of the United States in that "the statute . . . is so vague that the defendants were not put on notice as to what criminal act they had allegedly

committed" (¶4); a denial of due process under the Fourteenth Amendment in that "said statute is unconscionably vague . . . nowhere in said statute does there appear a definition of disturbing the peace or committing any unlawful act" (¶5); and a denial of due process under the Fourteenth Amendment in that the law gave the "peace officers untrammelled and arbitrary authority to predetermine the commission of the intent to commit an offense under said statute", and in that the determination of forbidden acts was "left solely to the discretion of the said Peace Officer" (¶6).

The Supreme Court of Georgia ruled on the five contentions in the demurrers. It held that paragraphs 3 and 4 of the demurrer (R. 12), which objected that petitioners were arrested to enforce racial discrimination and a custom of racial segregation in municipally owned places of public recreation in violation of the equal protection and due process clauses of the Fourteenth Amendment, on the ground that these were improper speaking demurrers (R. 55). The Court rejected the claims of paragraphs 1, 2, and 5 of the demurrer (R. 11-13), that the statute was unconstitutionally vague, denying petitioners' rights under the due process clause of the Fourteenth Amendment, holding that the language of the statute was "in terms so lucid and unambiguous that a person of common intelligence would discern its meaning and apprehend with what violation he was charged" (R. 57), and that the law had "a clear-cut standard to apprise one of what constitutes a criminal act and thus to guide the conduct of such officer" (R. 57).

ARGUMENT

I.

The Petitioners Were Denied Due Process in That They Were Convicted Under a Statute Too Vague and Indefinite to Provide an Ascertainable Standard of Guilt, and Which Provided No Fair Warning That Petitioners' Conduct Was Proscribed. The Only Rational Alternative Conclusion Would Be That Petitioners Were Convicted Without Any Evidence of Their Guilt.

The statute under which petitioners were convicted in this case, Section 26-5301, Code of Georgia, was held by the Supreme Court of Georgia to be "so lucid and unambiguous that a person of common intelligence would discern its meaning and apprehend with what violation he was charged" (R. 57). The court below discussed petitioners' argument that the law was vague only by referring to the common law origins of the phrase "disturbing the public peace," by asserting that this phrase was a synonym of "breach of the peace," and that this idea "has long been inherently encompassed in our law and is prevalent in the various jurisdictions" (R. 56). The court also said that the crime of unlawful assembly has common law origins (R. 56), but offered no definition of the crime as embodied in this statute; nor did the court say the statute was the equivalent of common law unlawful assembly. The opinion contained no discussion of the evidence in this case.[4] The court did say that it had no occasion to consider the alleged vagueness of the statutory phrase "or committing any unlawful act", because the accusation charged petitioners only

[4] The trial court charge to the jury did not discuss the evidence or the meaning of the statute, except to state that city policemen were "peace officers" within the meaning of the law.

under the phrase concerning "disturbing the public peace" (R. 55).

The Georgia Supreme Court did not refer to any prior opinions construing Section 26-5301. Prior to this decision, the statute had been mentioned only two times in published opinions.[5] *Kent* v. *Southern R. Co.*, 52 Ga. App. 731, 184 S. E. 638 (1935),[6] and *Samuels* v. *State*, 103 Ga. App. 66, 118 S. E. 2d 231 (1961).[7] Of these two cases, only the *Samuels* case, *supra*, involved a prosecution under Section 26-5301.

In *Samuels* v. *State*, *supra*, three Negroes were held to violate Section 26-5301 in a prosecution arising from a completely peaceful "sit-in" at a drugstore lunch counter where the police, but not the owner, ordered them to leave. The appellate court supplied an element to convict by judicially noticing that hostility to lunch counter desegregation might lead white persons to attack defendants, and that the defendants should have known this. The facts in the *Samuels* case, set out more fully in the note below, bear

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[5] A similar provision appeared in the Ga. Penal Code of 1816 (Ga. L. 1816, p. 178), Lamar's Compilation of the Laws of Georgia (1821), p. 592; and see Ga. Penal Code of 1833, §359, Cobb's Digest of the Statute Laws of Georgia (1851), p. 810. No reported cases have been discovered which discuss either of these predecessors of §26-5301.

[6] *Kent* v. *Southern R. Co.*, *supra*, was a damage suit brought by a picketing mill worker against a railroad for injury sustained from a tear-gas gun discharged by a police chief at the request of a railroad conductor to disperse a group of 50 strikers, including plaintiff, who were blocking a train from entering a mill by standing on the tracks. In holding the complaint demurrable, the court said that plaintiff and those with him blocking the train violated §26-5301 and other penal laws.

[7] A companion case, *Martin* v. *State*, 103 Ga. App. 69, 118 S. E. 2d 233, affirmed convictions said to be on facts similar to *Samuels*, *supra*, on authority of that case, without discussion of the facts or §26-5301.

a striking similarity to *Garner* v. *Louisiana*, 368 U. S. 157; the same is true of the judicial notice theory argued but rejected in *Garner, supra.*[8]

Petitioners submit that §26-5301 is by no means clear and unambiguous, either in its terms or in light of the construction placed upon it by the state courts. The antiquity of the law does nothing to add clarity to it, particularly since it has so rarely been mentioned in the case law.[9]

If the *Samuels* case construction of the law is accepted, the statute certainly affords no ascertainable standard of

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[8] In *Samuels* v. *State, supra*, it was undisputed that defendants were quiet, peaceable and orderly and that they merely courteously requested service at a lunch counter customarily reserved for whites; that they were refused service because they were colored; that they were not asked to leave by any store employee; that a police officer was called and defendants were arrested for not obeying his order to leave (118 S. E. 2d at 232-233). There was no evidence of any threats or actual violence or disorder, but a number of white persons gathered as onlookers, and several witnesses opined "that the presence of the defendants would tend to create a disturbance" (*Ibid.*). The Georgia Court of Appeals construed §26-5301 to cover such orderly conduct that was not in and of itself a disturbance of the peace. To support this the court quoted at length from Corpus Juris for a definition of "breach of the peace" and cited two Georgia decisions holding that cursing and abusive language tending to incite to immediate violence is a breach of the peace. See, e.g., *Faulkner* v. *State*, 166 Ga. 645, 144 S. E. 193 (1928), and *Elmore* v. *State*, 15 Ga. App. 461, 83 S. E. 799 (1914). To sustain the conviction, the court held that the trial court "undoubtedly" judicially noticed the fact that lunch counter segregation was a custom throughout the southeast part of the United States; that "the vast majority of the white people in these areas" have such strong feelings in favor of continuance of these customs that "attempts to break down the custom have more frequently than not been met with violent and forceable resistance on the part of the white people" (168 S. E. 2d at 233). The court then concluded that defendants were bound to know that their acts "might" result in violent opposition by local white people, and on this basis held the arrests and convictions justified. (*Ibid.*)

[9] Laws similar to the statute in *Winters* v. *New York*, 333 U. S. 507, 511, were said to have "lain dormant for decades."

guilt. There is no real standard for determining the existence of a "*purpose* to disturb the public peace." This determination is left entirely in the discretion of the police, the courts, and the jury. When the law is construed to apply to peaceful and orderly conduct which may incite others to violence, without any required showing of threats or other overt manifestations of impending disorder or violence, the question left for the court or jury is: Whether under existing conditions, including the attitudes of a community majority with respect to particular peaceful and lawful conduct, as appraised by the court or jury from general knowledge not limited to the evidence, the defendant should have believed that his conduct might result in violent opposition? This is plainly not a mere requirement that a defendant make a forecast based on a rule of reason. Rather, it is a requirement that he forecast a jury's determination which in itself must be based on "pure speculation" as to the future conduct of others. *Herndon* v. *Lowry*, 301 U. S. 242, 263. If the public attitudes that this determination involves were a fixed and static thing, the decision would be perilous enough—even for a scientific opinion analyst or pollster. But public attitudes are not static. The subject of race relations, for one example, readily brings to mind cases of peaceful acceptance of desegregation in places where there has been expected violent opposition. Indeed, lunch counters in Savannah have been desegregated notwithstanding the views expressed in the *Samuels* case, *supra* (New York Times, July 9, 1961, p. 65, col. 1). Cf. footnote 8, *supra*.

To make the peaceful exercise of a constitutional right subject to a preliminary guess of this nature, under penalty of fine or imprisonment, is so to deter the exercise of the right as to practically destroy it. See *Herndon* v. *Lowry*, 301 U. S. 242, 261-264. Just as the "current rate of per diem

wages in the locality" was held inherently incapable of fixation in *Connally* v. *General Construction Co.*, 269 U. S. 385, 393-395, so in this case the required judicial appraisal of the attitudes of an amorphous vast community majority, as viewed from the defendants' point of view, provides no ascertainable standard for the court or jury.

If the statute is considered without the benefit of the construction given it in the *Samuels* case, *supra*, it could not be known whether the law covered peaceful and orderly acts or merely outwardly disorderly conduct; whether an actual or an imminent or merely a foreseeable disturbance was required; whether violence was essential and, if so, whether it must be actual or merely threatened; whether the defendants' "purpose" must be manifested by some overt act or whether it may be supplied by a jury determination, discretionary or otherwise.

It is evident that this law is not "narrowly drawn to define and punish specific conduct," *Cantwell* v. *Connecticut*, 310 U. S. 296, 311. Here, as in *Cantwell* (310 U. S. at 308), the vice of the law consists in its "sweeping in a great variety of conduct under a general and indefinite characterization and leaving to the executive and judicial branches too wide a discretion in its application."

The opinion below cites *Faulkner* v. *State*, 166 Ga. 645, 665, 144 S. E. 193 (1928), a case holding that abusive and profane language was a breach of the peace. This Court has upheld a prohibition aimed at such direct incitements to violence in a law "narrowly drawn to define and punish specific conduct." *Chaplinski* v. *New Hampshire*, 315 U. S. 568, 573. Insulting or fighting words were said to receive no protection as free speech because they are "no essential part of any exposition of ideas and are of such slight social value . . . " (315 U. S. at 572). But no comparable char-

acterization can be given to petitioners' conduct, whether it be regarded as merely playing a basketball game, or as a profound non-verbal expression of the impropriety of racial segregation in public parks.

As stated by Mr. Justice Harlan, concurring in *Garner* v. *Louisiana,* 368 U. S. 157, 202:

> But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all-inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." Cantwell v. Connecticut, supra (310 U. S. at 311); Thornhill v. Alabama, 310 U. S. 88, 105.

As this court held in *Thornhill* v. *Alabama,* 310 U. S. 88, 97, "a penal statute . . . which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press" brings to bear a threat similar to that involved in discretionary licensing of free expression. That opinion said:

> The existence of such a statute, which readily lends itself to harsh and discretionary enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. 310 U. S. at 97-98.

Similarly here, the existence of an indefinite unlawful assembly law operates to deter and restrain any attempt by Negro citizens to exercise constitutional rights to nonsegregated use of public facilities. The Fourteenth Amendment was primarily designed to protect the civil rights of Negroes. *Strauder* v. *West Virginia*, 100 U. S. 303, 307. Such rights cannot properly be regarded as any less preferred than the First Amendment type protections incorporated into the Fourteenth Amendment by the due process clause. The right to nonsegregated use of facilities the government provides is so fundamental as to be protected both as "liberty" under the due process clause and by the equal protection clause of the Amendment. *Cooper* v. *Aaron*, 358 U. S. 1, 19; cf. *Bolling* v. *Sharpe*, 347 U. S. 497.

Hague v. *C. I. O.*, 307 U. S. 496, also supports the proposition that §26-5301 is unconstitutionally general and indefinite. In *Hague, supra*, the right of free assembly was limited by a requirement that a permit be obtained from an official who could refuse a permit only "for the purpose of preventing riots, disturbances, or disorderly assemblage" (307 U. S. at 502, n. 1). The court held the law invalid on its face because, "it can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression. . . . But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right" (307 U. S. at 517). And, of course, one accused under a general and sweeping law has no obligation to demonstrate that the state could not have written a different and more precise law constitutionally proscribing his conduct. *Thornhill* v. *Alabama, supra*, at 198. Furthermore:

> [I]t is the statute and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.

> Stromberg v. California, 238 U. S. 359, 368; Schneider v. State, 308 U. S. 147, 155, 162, 163. Compare Lanzetta v. New Jersey, 306 U. S. 451. (*Ibid.*)

Turning to the facts of the present case, it is equally apparent that §26-5301 gave no fair warning of the offense punished, and that it would confer unrestrained discretion of the exercise of constitutional freedoms.

First, there was no claim that petitioners' conduct was, in itself, disorderly or offensive. The police officer testified to the contrary that "they were not necessarily creating any disorder, they were just 'shooting at the goal,' that is all they were doing. They wasn't disturbing anything" (R. 50). There was no admission by the defendants of a *purpose* to disturb the public peace, and there was nothing in their conduct which might justify a determination that they had such a purpose. This is true because there was neither an actual disturbance of the peace, nor any evidence that their conduct made such a disturbance imminent or even foreseeable because of its tendency to provoke a disorderly response from others. The only thing in the record touching upon the possibility that defendants' conduct might have led to a breach of the peace was testimony by officer Thompson that:

> The purpose of asking them to leave was to keep down trouble, which looked like to me might start—there were five or six cars driving around the park at the time, white people (sic) (R. 40).

There was an unexplained statement that " . . . I arrested these people because we were afraid of what was going to happen" (R. 42). But the record contains no support for the policeman's fears. There was no evidence that anyone in the passing automobiles even observed petitioners, and

certainly no evidence that these passersby did or said anything to indicate that they were disturbed in any way or were provoked or angered by petitioners' conduct. There was no evidence that any of the automobiles stopped or approached petitioners, or that traffic was impeded. There is a positive statement by the officer that this automobile traffic was not unusual for that time of day (R. 41).

The only other person whom the record shows to have observed petitioners' conduct was the unidentified white lady who reported to the officers merely that colored people were playing basketball in the park. There was no testimony by the officers that she manifested any disturbance, anger, or anxiety and certainly no indication that she was provoked to the point of creating disorder. No other persons were present.[10] School children in the nearby schools were not expected in the area for "at least thirty minutes" by the officers (R. 41).[11]

There is no evidence that petitioners violated any park rules,[12] but, in any event, it appears that the arresting

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[10] The plain words of the statute require something in addition to disobedience of the officer's orders. If this were all that was required, the statute would nevertheless be offensively indefinite. *Garner* v. *Louisiana*, 368 U. S. 157, 204, footnote 11 (Mr. Justice Harlan concurring).

[11] The officers did not connect their order to leave with the anticipated presence of school children, nor was their order that petitioners leave timed to coincide with the arrival of the children. There was no park rule or policy prohibiting adults from using the park facilities when they were not being used by the children (R. 46); nor were any hours posted for use of the basketball courts (R. 44).

[12] The State has argued in its "Brief in Opposition to Certiorari" in this Court that petitioners were arrested because they were "grown men" on a "children's playground" and were dressed in street clothes. (See Brief in Opposition, p. 10, second paragraph.) But the superintendent of the recreation department testified that the basketball courts could be used by adults (R. 44) (and, there-

officer did not know the park rules and thus could not have predicated his command that petitioners leave or the arrest upon any park rule violation.[13]

The arresting officer expressly acknowledged that race was a factor in the arrests. Officer Thompson stated that:

> I arrested these people for playing basketball in Daffin Park. *One reason was because they were negroes* (R. 41). (Emphasis added.)

This testimony, of course, must be understood as it relates to the evidence that Daffin Park was one which was customarily used by white persons, with the occasional exception of Negro children fishing and playing—but not on the basketball court (R. 42), as a part of a more general local custom "to use the parks separately for the dif-

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fore, petitioners were not on a playground exclusively for children), and also that it was not improper to wear street clothes in unsupervised play on the basketball courts. The witness stated that "if there was a conflict betwen younger people and the older people using the park facilities, the preference would be for the younger people to use them, but we have no objections to older people using the facilities if there are no younger people present or if they are not scheduled to be used by the younger people" (R. 44). The witness said that he would not know whether any program was scheduled for the time petitioners were there without referring to his records (R. 47).

[13] See Note, 109 U. of Pa. L. Rev. 67, 81:

"It is scarcely consonant with ordered liberty that the amenability of an individual to punishment should be judged solely upon the sum total of badness or detriment to the legitimate interests of the state which can be found, or inferred, from a backward looking appraisal of his trial record."

And see *Id.* at footnote 74:

"A state could probably justify punishing most conduct which it desired to punish on the basis of the after-the-fact record, by isolating from the precisely detailed circumstances of the particular defendant's acts a sufficient quantum of substantive evil of legitimate legislative concern to dress up a tolerable constitutional crime."

ferent races" (R. 45). The officer's actions tend to confirm his statement that race was a reason for the arrests since he acknowledged that he proceeded directly to the basketball court to investigate upon merely being told that "colored people were playing in the Basketball Court", and —insofar as the record reveals—nothing more (R. 41). The officer did not ask the unidentified white lady who gave him this information how old the people playing basketball were. As he put it, "as soon as I found out these were colored people I immediately went there" (R. 41).

The race of the petitioners cannot validly be made a basis for the determination of their guilt. The mere presence of Negroes in a facility which they customarily do not use, cannot be regarded as criminal conduct or as evincing a purpose to violate the law. *Taylor* v. *Louisiana*, 370 U. S. 154. It is settled that this municipally operated park was an area which petitioners had a right to use, regardless of any segregation rule or custom, *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U. S. 877; *New Orleans City Park Improvement Asso.* v. *Detiege*, 358 U. S. 54; just as this was clear in *Taylor* v. *Louisiana*, *supra*, with respect to interstate transportation facilities. Cf. *Gayle* v. *Browder*, 352 U. S. 903; *Boynton* v. *Virginia*, 364 U. S. 454, 459, 460.

There was no evidence tending to show that petitioners' action in conflict with the racial custom of park segregation, would, in the locality involved, be likely to arouse passions or inflame those opposed to desegregation of publicly owned facilities. There is no such evidence relating either to the particular circumstances of this case or to any general community condition. Here there is not even evidence of "restless onlookers" which was held insufficient to support such a claim in *Taylor* v. *Louisiana*, 370 U. S. 154, 155.

The fact that Negro children had used this very park without the necessity for any official intervention (though their presence was noted by the police and park officials), further undermines any such speculation based on judicial notice of local attitudes[14]—even if such opposition could be substituted for evidence at the trial, as it clearly cannot be under the holding in *Garner* v. *Louisiana*, 368 U. S. 157, 173, 175-176.

Even beyond this lack of evidence to provide a basis for a permissible inference that petitioners' conduct engendered such extreme racial hostility as to incite unlawful, violent opposition, it is clear that this is not enough to justify using the state's police power to preserve segregation customs. *Taylor* v. *Louisiana*, 370 U. S. 154, 156, footnote 2; *Buchanan* v. *Warley*, 245 U. S. 60, 80, 81; *Cooper* v. *Aaron*, 358 U. S. 1. "For the police are supposed to be on the side of the Constitution, not on the side of discrimination." *Garner, supra*, at 177 (Justice Douglas concurring).

The only rational alternative explanation for the conviction, to the claim that the statute did not fairly warn against petitioners' conduct, is that there was indeed no evidence at all to support these convictions, thus requiring reversal under the doctrine of *Thompson* v. *City of Louisville*, 362 U. S. 199. The mere presence of Negroes on a customarily all-white city owned basketball court "is not, because it could not be" unlawful assembly. *Thompson* v.

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[14] There is, of course, no necessary consistency, even in a given locality in the South, between the vehemence of the attitudes of the white majority toward nonsegregated lunch counter service—as in *Garner, supra*—and the same group's attitude towards an all-Negro group, as here (or for that matter, even an integrated group) playing basketball in a city-owned facility customarily used by whites.

Louisville, 362 U. S. 199, 206, citing *Lanzetta* v. *New Jersey*, 306 U. S. 451. Certainly this statute does not give clear warning that the presence of a Negro on a customarily white basketball court is punishable. It is certainly not difficult to draft a segregation law specifically making it unlawful for a Negro to use a "white" park. Cf. *Holmes* v. *City of Atlanta*, 124 F. Supp. 290, 291-292 (N. D. Ga. 1954); aff'd 223 F. 2d 93 (5th Cir. 1955); vacated 350 U. S. 879. But the well-known invalidity of such open segregation laws has frequently led to the use of Aesopian language to accomplish the same purpose,[15] or the use of catch-all laws to the same end. *Garner* v. *Louisiana*, 368 U. S. 157.[16]

Petitioners' activity, if not a "demonstration" in the sense that a sit-in has become a well recognized form of protest (and there is nothing in the record to indicate whether petitioners went to Daffin Park as demonstrators to test segregation or merely to play basketball), was nevertheless sufficiently non-conformist to be regarded as evidencing petitioners' conviction that racial exclusion from a publicly owned park is improper. Such conduct within the area of protected liberty under the Fourteenth Amendment, may not constitutionally be reached by a vague and indefinite law which does not evince any legislative judgment that it represents so clear and present a danger that it should be criminally proscribed. *Cantwell* v. *Connecticut*, *supra*; *Garner* v. *Louisiana*, 368 U. S. 157, 196-207 (Mr. Justice Harlan concurring).

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[15] Compare the ordinance in *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 532 (5th Cir. 1960), which replaced an overt segregation requirement with a mandate of obedience to bus drivers' orders.

[16] The Swedish writer, Gunner Myrdal, noticed this in his book published 18 years ago saying that "... policemen in the South consider the racial etiquette as an extension of the law, and the courts recognize 'disturbance of the peace' as having almost unlimited scope," Myrdal, *An American Dilemma*, 618 (1944).

Finally, the State's suggested construction of §26-5301 renders it even more indefinite. The "Brief in Opposition to Certiorari," p. 12, suggests that the law does not require criminal intent at all, saying:[17]

> Thus it is not necessary to show whether the petitioners actually intended to create a breach of the peace to convict them.

What does "purpose" refer to if it does not refer to "actual intent"? If this construction of the law is correct, and no real criminal intent is required under §26-5301 to convict a person for an act admittedly not blameworthy *per se*, Georgia has denied due process. This would be an "indiscriminate classification of innocent with knowing activity [which] must fall as an assertion of arbitrary power" and which "offends due process." *Wieman* v. *Updegraff*, 344 U. S. 183, 191.

II.

The Judgment Below Does Not Rest Upon Adequate Non-Federal Grounds for Decision.

Initially it should be emphasized that the court below indisputably *did* consider and reject petitioners' due process claim under the Fourteenth Amendment. The State has never argued to the contrary either in its brief in opposition

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[17] In connection with this the "Brief in Opposition," p. 12, perhaps harmlessly misquotes *Cantwell* v. *Connecticut*, 310 U. S. 296, 309. Not so harmlessly it ignores the impact of the following sentence pointing out that practically all such decisions holding acts likely to provoke disorder to be a breach of the peace "even though no such eventuality [disorder] be intended", involved "profane, indecent or abusive remarks directed to the person of the hearer."

to certiorari or in the court below.[18] The court below concluded its discussion of the due process vagueness issue (R. 55-58) by asserting: "However, by applying the well-recognized principles and applicable tests above-stated, we find no deprivation of the defendants' constitutional rights under the Fourteenth Amendment of the United States Constitution" (R. 57-58).

The only potential area of dispute concerns whether this Court may consider the facts of petitioners' case in deciding the constitutional claim. This potential conflict does not arise because the court below ever said that it was prohibited from looking at the facts of the case. It did not so state; there is only an implication that this is so because the opinion was written as an abstract discussion of the extent to which §26-5301 was indefinite without reference to the facts of this case, or any other case; because the court below ruled that it would not appraise the facts relating to another and essentially different constitutional claim raised in the demurrer—the claim that the arrest was the product of discriminatory law enforcement designed to compel racial segregation in public parks; and because the court ruled that it would not consider petitioners' claim of error in the overruling of the motion for new trial.

The conflict over this limited issue is indeed only "potential" for the State has never argued either in the court below nor in this Court that no consideration may be given to the facts of the record in deciding the vagueness issue. To the contrary, indeed, the State has consistently argued that petitioners' acts were criminal under the law and that it gave them fair warning.[19]

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[18] Petitioners have deposited with the Clerk of this Court certified copies of all briefs filed in the Supreme Court of Georgia.

[19] See "Brief in Opposition to Certiorari," *passim;* see also, the State's "Brief of Defendant-in-Error" in the court below.

However, in the event that this matter is viewed by this Court as having any significance, petitioners present the following to demonstrate that in the circumstances of this case no significant limitation can be placed upon this Court's review because of any state procedural rule.

As has been said before, petitioners' due process vagueness claims were raised in both the demurrer (R. 11) and the motions for new trial (R. 17, et seq.). The vagueness objections were thus made both before and after the evidence against petitioners was adduced.

The Supreme Court of Georgia ruled that it would not consider the motion for new trial because it read petitioners' brief as abandoning the objection to the overruling of the motion for new trial. The opinion below acknowledged (R. 54) that defendants' brief did contain as one of three "Issues of Law" the following: "Did the court commit error in overruling plaintiff's-in-error motion for new trial?" [20] But the court went on to find an abandonment of this claim asserting that "there was no argument, citation or authority, or statement that such grounds were still relied upon", and that the point must be treated as abandoned under the applicable rule laid down in *Henderson* v. *Lott*, 163 Ga. 326, 136 S. E. 403.[21]

The court below thus found an implied waiver of a federal constitutional right. There was no assertion that petitioners made any expressed abandonment of the claim

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[20] "Brief of Plaintiff-in-Error", in court below, p. 6.

[21] The opinion below makes no reference to Section 6-1308, Ga. Code Ann., providing:

> "6-1308. *Questions to be considered.*—All questions raised in the motion for new trial shall be considered by the appellate court except where questions so raised are expressly or impliedly abandoned by counsel either in the brief or upon oral argument. A general insistence upon all the grounds of the motion shall be held to be sufficient. (Acts 1921, pp. 232, 233.)"

either in the brief or in oral argument. However, a fair reading of petitioners' brief filed in the court below does not support even the theory of implied abandonment. Petitioners' brief in the court below contained a portion labelled "Argument and Citation of Cases" which was not subdivided,[22] and which did argue that the law was vague making particular references to the facts in this record,[23] and did refer to appropriate decisions of this Court.[24]

The Georgia Court of Appeals has held that the mere citation of *one* applicable decision of that court was suffi-

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[22] Nothing in the rules of the Supreme Court of Georgia requires any subdivision of argument among the assigned errors. Rule 14 of the Georgia Supreme Court (printed in Section 24-4515, Ga. Code Ann.) states:

> *"Contents of brief of plaintiff in error."*—The brief of the plaintiff in error shall consist of two parts:
>
> (1) Part one shall contain a succinct but accurate statement of such pleadings, facts, assignments of error, and such other parts of the bill of exceptions or the record as are essential to a consideration of the errors complained of.
>
> (2) Part one shall also contain succinct and accurate statements of the issues of law as made by the errors assigned, and reference to the parts of the record or bill of exceptions necessary for consideration thereof.
>
> (3) Part two shall contain the argument and citation of authorities.

[23] See "Brief of Plaintiffs in Error," pp. 7-10. One example of such argument appears at p. 8:

> "Plaintiffs-in-Error could not possibly have predetermined from the wording of the statute that it would have punished as a misdemeanor an assembly for the purpose of playing basketball. It follows as a matter of course that if the act committed was not punishable, then the peace officer would not have the authority to command their dispersal. To be arrested and convicted pursuant to said statute denies to the Plaintiffs-in-Error due process of law as secured to them by the Fourteenth Amendment to the United States Constitution."

[24] Decisions of this Court on vagueness issues cited in the "Brief of Plaintiffs in Error" were *United States* v. *Brewer*, 139 U. S. 278; *Connally* v. *General Construction Co.*, 269 U. S. 385, 393; *Winters* v. *New York*, 333 U. S. 507.

cient argument of an assignment of error to prevent its being treated as abandoned, even absent a clear statement that the point was relied upon. *Roberts v. Baker*, 57 Ga. App. 733, 735, 196 S. E. 104. But here there is even more, for the argument begins with a statement that the "*principal* question" was raised by the overruling of the demurrer (Brief of Plaintiffs in Error, p. 7), thus, plainly implying that this was not the *only* question, but merely the chief, foremost, or highest in importance.[25]

It is submitted that the basis for this holding of abandonment or waiver of an aspect of a fundamental constitutional defense which is otherwise conceded to have been preserved, is so tenuous and unsupported as to compel the view that the court below did not exercise due regard for the general doctrine that every reasonable presumption is to be indulged against the waiver of a constitutional right. Cf. *Glasser* v. *United States*, 315 U. S. 60, 70.

Even beyond all this, if it be assumed *arguendo* that the procedural rules applied below must limit this Court's consideration of the petitioners' due process vagueness claim to any extent, it by no means necessarily follows that this Court is compelled to consider the law in a completely sterile and abstract fashion, blinding itself to the uses to which this law in all its generalities can be put, and has been put in the only other reported application of it. See e.g., *Samuels* v. *State*, 103 Ga. App. 66, 118 S. E. 2d 231 (1961); *Martin* v. *State*, 103 Ga. App. 69, 118 S. E. 2d 233 (1961). And since even though the Court below may not have discussed the evidence, it did have the full record before it, this Court should not ignore the fact that the very "judgment of conviction" represents in a real sense

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[25] See definition of "principal", adjective, in Webster's *New International Dictionary*, p. 1966 (2d ed.), and Black's *Law Dictionary*, p. 1355 (4th ed. 1951).

"a controlling construction of the statute", *Bailey* v. *Alabama,* 219 U. S. 219, 235; *Taylor* v. *Georgia,* 315 U. S. 25, 30.

The appellees argue in the "Brief in Opposition to Certiorari" that this Court may pass upon federal issues where the state court has refused to entertain them only if the State has applied a procedural rule inconsistently. But this Court has found such refusals unreasonable for reasons other than inconsistent application. *Staub* v. *Baxley,* 355 U. S. 313; *Terre Haute I. R. Co.* v. *Indiana,* 194 U. S. 579, 589; *Union P. R. Co.* v. *Public Service Commission,* 248 U. S. 67. Indeed, this Court has rejected attempts to limit the scope of its review on the theory that denials of due process must be ignored when, although they appear clearly from the proceedings, objections made were not renewed after the denial of due process became manifest. See *Blackburn* v. *Alabama,* 361 U. S. 199, 209-210; *Brown* v. *Mississippi,* 297 U. S. 278, 286-287.

Any state avoidance of federal constitutional issues raised by a defendant in a criminal proceeding must meet minimum standards of intrinsic fairness. It is submitted that the action of the court below in limiting consideration of the due process vagueness issue fails to meet such standards, and is as much a denial of due process as an erroneous decision on the merits. *Lawrence* v. *State Tax Comm.,* 286 U. S. 276, 282.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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